UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MICHAEL W. ALDERMAN,

Plaintiff,

-vs- **Case No.: 6:03-cv-41-Orl-22KRS**

JUAN MCDERMOTT, DOUGLAS A. OSBORNE, JOHN J. SILVERMAN, and CITY OF ORLANDO, FLORIDA,

Defendants.

ORDER

I. INTRODUCTION

This cause comes before the Court for consideration of the Defendants', Juan McDermott, Douglas A. Osborne, John J. Silverman, and the City of Orlando, Florida (hereinafter, "Defendants"), Motion for Summary Judgment (Doc. No. 33), and memorandum of law submitted in support thereof (Doc. No. 34), filed February 17, 2004, to which the Plaintiff, Michael W. Alderman, responded (Doc. No. 54) on March 22, 2004. Having reviewed the motion and memoranda, this Court **GRANTS IN PART** and **DENIES IN PART** the Motion for Summary Judgment (Doc. No. 33).

II. BACKGROUND

The Defendants, Juan McDermott (hereinafter, "Officer McDermott"), Douglas A. Osborne (hereinafter, "Officer Osborne"), and John J. Silverman (hereinafter, "Officer Silverman"), are police officers employed by Defendant, the City of Orlando, Florida Police

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Department (hereinafter, "Orlando Police Department").[1] The Plaintiff, Michael W. Alderman (hereinafter, "Mr. Alderman"), is a resident of Orlando, Florida.[2] This action, brought pursuant to 42 U.S.C. §§ 1983 and 1988, alleges, *inter alia*, civil rights violations encompassing the Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.[3]

On June 30, 2000, Officers McDermott, Osborne, and Silverman were assigned to the Tactical Operations Unit (hereinafter, "the TAC Unit") of the Orlando Police Department.[4] In that capacity, they responded - undercover - to specific crime problems in the city.[5]

In the early morning hours of June 30, 2002, the TAC Unit, including Officers McDermott, Osborne, and Silverman, was assigned to an area around the Roxy nightclub.[6] There, they engaged in covert surveillance in response to vehicle burglaries reported in the vicinity.[7] At all relevant times, each officer was assigned an unmarked car.[8] In addition, each

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[1]*See* February 16, 2004 Affidavit of Officer McDermott (hereinafter, "McDermott Affidavit"), ¶2 at 1; February 13, 2004 Affidavit of Officer Osborne (hereinafter, "Osborne Affidavit"), ¶2 at 1; February 13, 2004 Affidavit of Officer Silverman (hereinafter, "Silverman Affidavit"), ¶2 at 1.

[2]*See* August 15, 2003 Deposition of Mr. Alderman (Doc. No. 45), lines 24-25 at 5.

[3]*See* Amended Complaint and Addition of the City of Orlando as a Defendant (Doc. No. 16), ¶1 at 1.

[4]*See* McDermott Affidavit, ¶3 at 2; Osborne Affidavit, ¶3 at 2; Silverman Affidavit, ¶ 3 at 2.

[5]*See* McDermott Affidavit, ¶3 at 2; Osborne Affidavit, ¶3 at 2; Silverman Affidavit, ¶ 3 at 2.

[6]*See* McDermott Affidavit, ¶¶4-5 at 2; Osborne Affidavit, ¶¶4-5 at 2; Silverman Affidavit, ¶¶ 4-5 at 2.

[7]*See* McDermott Affidavit, ¶4 at 2; Osborne Affidavit, ¶4 at 2; Silverman Affidavit, ¶ 4 at 2.

[8]*See* McDermott Affidavit, ¶7 at 2; Osborne Affidavit, ¶8 at 2; Silverman Affidavit, ¶ 8 at 3.

officer was dressed in plain clothing; however, all sported a black, tactical police vest marked with light-colored, reflective "POLICE" lettering on the front and back,[9] and all wore a department-issued police badge.[10] Throughout the surveillance, the officers were able to maintain radio contact with each other.[11]

At approximately a few minutes after 2:00 a.m., Officer McDermott witnessed a two-toned Ford Bronco driven by a white male pull into an empty church parking lot near the Roxy nightclub.[12] Shortly thereafter, Officer Silverman saw a naked, white male with a shirt wrapped around his head and eyeglasses walking in the area.[13] The naked man traveled directly along the side of Officer Silverman's vehicle, some two or three feet away.[14] Nevertheless, Officer Silverman did not exit his vehicle to effect an arrest.[15] Instead, he

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[9]*See* McDermott Affidavit, ¶6 at 2; Osborne Affidavit, ¶6 at 2; Silverman Affidavit, ¶ 6 at 2.

[10]*See* McDermott Affidavit, ¶6 at 2; Osborne Affidavit, ¶7 at 2; Silverman Affidavit, ¶ 7 at 2.

[11]*See* McDermott Affidavit, ¶8 at 3; Osborne Affidavit, ¶9 at 2; Silverman Affidavit, ¶ 9 at 3.

[12]*See* McDermott Affidavit, ¶9 at 3.

[13]*See* Silverman Affidavit, ¶11 at 3. In a sworn statement and charging affidavit dated June 30, 2000, Officer Silverman neglected to mention that the naked man that walked passed his car had a mustache. He has since amended his description of the naked man to include that feature. Mr. Alderman's most prominent facial feature is a mustache.

[14]*See* Silverman Affidavit, ¶11 at 3.

[15]*See* February 6, 2004 Deposition of Officer Silverman (Doc. No. 57), line 24 at pg. 30 through line 14 at pg. 31. According to Officer Silverman, he did not exit his vehicle in order to effect an arrest because he was shocked:

> Q. If you were so concerned [about the naked man], why didn't you get out and follow him?
>
> A. I did, sir, after short order. But once again, the period of time from my door window to the corner of that building was a period of five

(continued...)

watched the naked man enter between a hedgerow and the wall of a closed business, stealthily hugging the wall as he passed around a corner and out of sight.[16] Officer Silverman radioed Officers McDermott and Osborne about his observations and the naked man's path and direction of travel.[17] When he finally exited his vehicle to investigate, however, the naked man was nowhere to be found.[18]

Several minutes later, Officer McDermott witnessed the two-toned Ford Bronco exit the church parking lot.[19] Although Officer McDermott temporarily lost sight of the Bronco, he later relocated it parked behind a closed auto-body repair shop and advised Officers Osborne and Silverman accordingly.[20] Upon inspection, Officer McDermott noticed that the

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[15](...continued)

> to seven seconds. And I'm trained to react to deadly force situations and things that are immediately a threat to the public, armed subject, things of that nature, and I pride myself on being tactically aware in that regard.
>
> But to be totally honest, sir, in the 15 years that I've been in law enforcement, I have never been presented with that scenario.
>
> Q. Well, you were shocked, is that why you didn't do it?
>
> A. Most definitely, sir.

Doc. No. 57, line 24 at pg. 30 through line 14 at pg. 31.

[16]*See* Silverman Affidavit, ¶11 at 3.

[17]*See* McDermott Affidavit, ¶10 at 3; Osborne Affidavit, ¶ 10 at 3; Silverman Affidavit, ¶ 12 at 3.

[18]*See* Silverman Affidavit, ¶12 at 3.

[19]*See* McDermott Affidavit, ¶ 11 at 3; Silverman Affidavit, ¶ 13 at 3.

[20]*See* McDermott Affidavit, ¶11 at 3; Osborne Affidavit, ¶12 at 3; Silverman Affidavit, ¶ 13 at 3.

Bronco's windows were down; no passengers were inside.[21] The hood of the automobile was warm, confirming that the Bronco had recently been driven.[22]

Once Officer McDermott turned away from the Bronco, he heard a woman screaming in the distance.[23] In response, he entered his vehicle, radioed Officer Osborne and headed in the direction of the disturbance.[24]

Upon arriving at the scene, Officer McDermott located three young women.[25] Two of the women, Tara Berry and Shannon Nydam, told Officer McDermott that a naked white man with a shirt wrapped around his head appeared out of the shadows in front of them.[26] They further stated that he was masturbating, but when they screamed, he ran away.[27] Officer McDermott radioed Officer Osborne and Officer Silverman of his findings.[28]

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[21]*See* McDermott Affidavit, ¶11 at 3.

[22]*See id.*, ¶11 at 3.

[23]*See* McDermott Affidavit, ¶12 at 3-4; Osborne Affidavit, ¶13 at 3.

[24]*See* McDermott Affidavit, ¶12 at 3-4; Osborne Affidavit, ¶ 13 at 3.

[25]*See* McDermott Affidavit, ¶12 at 3-4.

[26]*See* McDermott Affidavit, ¶12 at 3-4; *see also* June 30, 2000 Affidavit of Tara Berry; June 30, 2000 Affidavit of Shannon Nydam.

[27]*See* McDermott Affidavit, ¶12 at 3-4; *see also* June 30, 2000 Affidavit of Tara Berry; June 30, 2000 Affidavit of Shannon Nydam.

[28]*See* McDermott Affidavit, ¶12 at 3-4; Osborne Affidavit, ¶13 at 3; Silverman Affidavit, ¶ 14 at 4.

Less than two (2) minutes later, the two-toned Bronco, again driven by a white man, drove out from the direction in which the naked man had run.[29] According to Tara Berry, the Bronco was driven by the man she had just witnessed masturbating in public:

> A. Yeah. And then we didn't see him [the naked man] and then he drove past us real fast in a -- maybe it was a Bronco or some kind of like old utility vehicle. I don't know if it was white or black or red and he took off in that and we could see him.
>
> Q. How do you mean that you could see him ?
>
> A. Well, I could see him sitting in the car and he had no shirt on.
>
> Q. When he drove by or down the road?
>
> A. Yeah, when he drove by past our car and he took off real fast.
>
> Q. So you saw a guy drive by with no shirt or you saw a guy drive by that was the same guy?
>
> A. It was the same guy.
>
> Q. And how do you know that?
>
> A. Because it could -- because he was really tall and he was kind of skinny, I think, and I just recognized him because, I mean, it was right after that he got right into the vehicle and he started taking off and I mean, it was -- he was making -- he was loud.

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[29]*See* McDermott Affidavit, ¶13 at 4; Silverman Affidavit, ¶15 at 4; May 4, 2001 Deposition of Tara Berry (Doc. No. 63), line 10 at pg. 14 through line 24 at pg. 15; May 4, 2001 Deposition of Shannon Nydam (Doc. No. 64), line 20 at pg. 21 through line 4 at pg. 24.

Q. Did you actually see him get into the car?

A. No.

Q. All right. Did you actually see him sitting in the car before he started moving the car?

A. No. He just like went by real fast.

Q. So apparently after he left the bush area and ran, the next time that you saw him or you believe that you saw him was when this vehicle drove by?

A. Well, he took off naked and he ran behind the building and right after that, I mean, it was enough time to get in his car and I guess he got in his Bronco or whatever it was and he took off. I mean, common sense, I knew. You know what I mean?[30]

At this juncture, the parties' accounts of the incident vary, and while this Court is legally bound to view the evidence in the light most favorable to Mr. Alderman, *see Brown v. Cochran*, 171 F. 3d 1329, 1332 (11th Cir. 1999) (holding that for purposes of qualified immunity "[i]n deciding whether the defendant's conduct was objectively reasonable or not, the court must resolve all factual disputes in favor of the plaintiff") (internal citation omitted), the undersigned finds it important to memorialize the differences in the parties' versions of the facts.

[30]Doc. No. 63, line 10 at pg. 14 through line 17 at pg. 15.

According to Officer McDermott, when he spotted the Bronco, he exited his vehicle and stood in the middle of the road.[31] To identify himself, he showed his badge and was wearing a black, tactical police vest marked with light-colored reflective "POLICE" lettering on the front.[32] Officer McDermott additionally yelled "Police! Stop!"[33] The Bronco nevertheless drove at him, jumped the curb, and traveled around a building in an effort to avoid the police.[34]

Mr. Alderman maintains that nothing like this ever occurred:

> Q. At any time that you were on Lowell Boulevard, did you see a white male standing in the roadway holding a police badge and wearing a tactical vest that said police on it?
>
> A. No.[35]

Likewise, the two witnesses at the scene, Tara Berry and Shannon Nydam, have no recollection of that event:

> Q. Did you notice anything about the Bronco's departure [from the scene of the crime], the way it was being driven?
>
> A. No, I didn't really.
>
> Q. Was there anything that occurred that you thought was out of the ordinary?
>
> A. He was going kind of fast.

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[31]McDermott Affidavit, ¶ 13 at 4; Silverman Affidavit, ¶15 at 4.

[32]McDermott Affidavit, ¶ 13 at 4; Silverman Affidavit, ¶15 at 4.

[33]McDermott Affidavit, ¶ 13 at 4; Silverman Affidavit, ¶15 at 4.

[34]McDermott Affidavit, ¶ 13 at 4; Silverman Affidavit, ¶15 at 4.

[35]Doc. No. 45, lines 11-15 at 73.

Q. Was he maintaining the same lane of travel?

A. He cut through a parking lot, so I really --

Q. Is this a road over here?

A. This is the parking lot road. There's like an exit here (indicating) This was the parking lot.

Q. Did he hit anything?

A. No, not that I know of.

Q. Did he almost hit anything?

A. I don't -- not that I know of.

Q. You were there with Tara and Allison and the police officer the entire time?

A. The police officer was only there for about ten seconds and he jumped back in his car and left.[36]

Armed with these facts and circumstances, Officer McDermott again radioed Officers Osborne and Silverman.[37] The trio then searched for the Bronco, eventually locating it on a nearby road.[38] There, they surreptitiously began following the Bronco in their unmarked vehicles.[39] Concomitantly, Officer McDermott radioed the Orlando Police Department for a marked patrol car.[40] A marked patrol car was necessary because it was

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[36]Doc. No. 64, line 15 at pg. 23 through line 8 at pg. 24.

[37]McDermott Affidavit, ¶ 13 at 4; Osborne Affidavit, ¶ 14 at 3; Silverman Affidavit, ¶15 at 4.

[38]McDermott Affidavit, ¶ 14 at 4-5; Osborne Affidavit, ¶ 15 at 3-4; Silverman Affidavit, ¶16 at 4-5.

[39]McDermott Affidavit, ¶¶ 14-16 at 4-5; Osborne Affidavit, ¶¶ 15-17 at 3-4; Silverman Affidavit, ¶¶16-18 at 4-5.

[40]McDermott Affidavit, ¶ 14 at 4-5; Silverman Affidavit, ¶16 at 4-5.

against department policy for unmarked vehicles to engage in a vehicle pursuit in the absence of imminent danger of serious bodily injury or death.[41]

Mr. Alderman's version of events is this: Driving a 1990 two-toned Ford Bronco,[42] he met his sister, Phyllis Osbourne, outside the Roxy night club.[43] The pair had arranged to meet there because Phyllis wanted to show her brother a good time; he had not been out in a while.[44] Both Mr. Alderman and his sister parked their vehicles in a lot behind the night club.[45]

When Mr. Alderman attempted to enter the nightclub, he was denied access for wearing tennis shoes; a violation of Roxy's dress code.[46] As a consequence, he and his sister departed for their respective homes.[47] En route, Mr. Alderman stopped at another parking lot in the area in order to relieve himself. [48] He then continued on his way.

At that point in time, Mr. Alderman observed a peculiarity: two civilian vehicles following closely behind his vehicle.[49] According to Mr. Alderman, the vehicles were

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[41]McDermott Affidavit, ¶ 25 at 7; Osborne Affidavit, ¶ 26 at 5; Silverman Affidavit, ¶ 26 at 7.

[42]*See* Doc. No. 45, lines 4-6 at pg. 16; *see also* Photographs of Ford 150 Pickup Truck and Ford Bronco at scene on June 30, 2000.

[43]*See* Doc. No. 45, line 20 at pg. 19 through line 2 at pg. 20.

[44]*See id.*, line 24 at pg. 19 through line 2 at pg. 20.

[45]*See id.*, line 20 at pg. 19 through line 16 at pg. 20.

[46]*See id.*, lines 20 at pg. 20 through line 5 at pg. 21.

[47]*See id.*, lines 6-16 at 21.

[48]*See id.*, line 2 at pg. 74 through line 4 at pg. 75.

[49]*See id.*, line 14 at pg. 22 through line 1 at pg. 23.

driving "crazy",[50] "like they were going to run into [him] or run [him] off the road."[51] By his own account, "[t]hey were playing cowboys and Indians."[52]

In a desperate search for help, Mr. Alderman pulled into a Cumberland Farms convenience store/gas station.[53] There, he observed a man behind the service counter.[54] Mr. Alderman nevertheless continued back onto the highway where he again encountered the same vehicles following him.[55]

Concerned for his safety, Mr. Alderman turned into the driveway of an apartment complex, letting Officer McDermott's vehicle (a white Ford 150 Pickup Truck) pass him by.[56] When he reentered the road - proceeding east - he saw the white Ford 150 Pickup Truck turn around and drive west towards his vehicle.[57] As the vehicles approached, Officer McDermott intentionally crossed the center lane, ramming Mr. Alderman's vehicle.[58] Mr.

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[50]*Id.*, line 1 at pg. 23.

[51]*Id.*, lines, 15-16 at pg. 23.

[52]*Id.*, line 4 at pg. 25.

[53]*See id.*, line 14 at pg. 26 through line 9 at pg. 27.

[54]*See id.*, lines 12-13 at 27.

[55]*See id.*, line 21 at pg. 27 through line 9 pg. 29.

[56]*See id.*, line 24 at pg. 29 through line 3 at pg. 30; *see also* Plaintiff's March 21, 2003 Answer to Defendants' First Set of Interrogatories, ¶ 7 at 2.

[57]*See id.*, line 25 at pg. 30, through line 2 at pg. 31; *see also* Plaintiff's March 21, 2003 Answers to Defendants' 1st Set of Interrogatories, ¶ 7 at 2.

[58]Plaintiff's March 21, 2003 Answers to Defendants' 1st Set of Interrogatories, ¶ 7 at 2; *see also* Testimony of Pat Miller in Excerpts from Reckless Driving Jury Trial Before the Honorable James E. Glatt (Doc. No. 62), lines 5 through 18 at pg. 182. Pat Miller allegedly witnessed the accident:

Q. Okay. What did you observe?

(continued...)

Alderman surmises that he was traveling approximately 20-25 miles per hour, while Officer McDermott was traveling 40-50 miles per hour at the time of the impact.[59] Both vehicles sustained substantial damage.[60] While some of the Defendant Officers had blue lights in their

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[58](...continued)

A. So he [Officer McDermott] started coming back up [Dahlia]. He [Officer McDermott] wasn't going real fast but, you know, he was motoring along. I thought, okay, well, they're going to pin this guy [the driver of the Bronco] in, but -- so he [Officer McDermott] came down and he [Officer McDermott] crossed over into the other lane and hit the lead vehicle, the Bronco, too. Not completely head-on, but a bit of -- at an angle and just pretty much rammed him.

Q. Did the Bronco ever leave the eastbound lane of travel?

A. No.

Q. Did the pickup [operated by Officer McDermott]--did you ever see the pickup backing up?

A. Unh-unh.

Q. Did you ever see the pickup stationary?

A. Unh-unh.

Q. Did the pickup get knocked into the westbound -- excuse me -- into the eastbound lane, or did it go into the eastbound lane?

A. It looked to me like it [Officer McDermott's vehicle] was steered into the eastbound lane.

Doc. No. 62, lines 5 through 18 at pg. 182.

[59]*See* Doc. No. 45, line 24 at pg. 31 through line 20 at pg. 32.

[60]*See* Photographs of Ford 150 Pickup Truck and Ford Bronco at scene on June 30, 2000. To reiterate, the Defendants offer a different account of the incident. According to their recollection, when the vehicles arrived at the intersection of Semoran Boulevard and Dahlia Drive, the Bronco accelerated sharply left into oncoming northbound lanes of traffic, and into a Cumberland Farms' parking lot located on the northeast corner of the intersection. McDermott Affidavit, ¶ 17 at 5 . There, the Bronco continued at a high rate of speed towards the southeast exit back onto Semoran Boulevard and then onto Dahlia Drive. McDermott Affidavit, ¶ 17 at 5; Osborne Affidavit, ¶ 18 at 4; Silverman Affidavit, ¶ 19 at 5. When Officer McDermott turned onto Dahlia Drive to follow the Bronco, the Bronco nearly drove into the side of his vehicle. McDermott Affidavit, ¶ 17 at 5. Then, after traveling approximately one (1) or two (2) blocks, the Bronco suddenly accelerated and

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vehicles, they did not activate them at any time during the incident.[61] It was against police department policy for unmarked vehicles to effect traffic stops.

Immediately following the collision, Officer Silverman approached Mr. Alderman, forcibly removed him from his seat, and slammed him into the ground.[62] He then pointed a gun at Mr. Alderman's head, and proceeded to kick him in his side.[63] All the while, the Defendants never identified themselves as police officers.[64] As a result, an eye witness at the

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[60](...continued)
skidded into an apartment complex's parking lot. *See* McDermott Affidavit ¶ 18 at 5; Osborne Affidavit, ¶ 19 at 4; Silverman Affidavit, ¶ 20 at 5. When Officer McDermott turned his vehicle around to proceed back towards the apartment complex's parking lot, the Bronco, proceeding in the opposite direction, struck his vehicle in the right, front panel. *See* McDermott Affidavit, ¶¶ 19-20 at 5-6, Osborne Affidavit, ¶22 at 5; Silverman Affidavit, ¶ 22 at 6.

[61]*See* February 6, 2004 Deposition of Officer Osborne (Doc. No. 65), lines 19-20 at pg. 28; *see also* February 6, 2004 Deposition of Officer Silverman (Doc. No. 57) , lines 2-7 at pg. 81 (stating that he believed he had a blue light in his vehicle). In his most recent deposition, Officer McDermott did not recall whether he had a blue light in his vehicle, *see* Friday, February 6, 2004 Deposition of Officer McDermott (Doc. No. 60), lines 1-6 at 111. At Mr. Alderman's jury trial for lewd and lascivious conduct, however, he testified that the unmarked vehicles had such devices:

Q. You were in unmarked vehicles right?

A. Yes, sir.

Q. But you had blue lights in those vehicles, did you not?

A. Yes, sir.

Excerpts from a Jury Trial before the Honorable Janis Mary Halker-Simpson (Doc. No. 58), line 25 at pg. 86 through line 3 at pg. 87.

[62]*See* Doc. No. 45, lines 4-12 at 34; *see also* Plaintiff's March 21, 2003 Answers to Defendants' 1st Set of Interrogatories, ¶ 7 at 3.

[63]*See* Doc. No. 45, lines 9-12 at pg. 34; *see also* Plaintiff's March 21, 2003 Answers to Defendants' 1st Set of Interrogatories, ¶¶ 7 & 8 at 2-4.

[64]*See* Doc. No. 45, line 13 at pg. 34 through line 4 at pg. 35; *see also* Plaintiff's March 21, 2003 (continued...)

scene[65] thought he was observing a crime of violence: "I didn't know it was law enforcement. I thought somebody was just beating the tar out of somebody else."[66] Additionally, Mr. Alderman thought he was being robbed by a gang.[67] He did not realize that the Defendants were police officers until after one of them told him that he was under arrest for reckless driving.[68]

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[64](...continued)
Answers to Defendant's 1st Set of Interrogatories, ¶7 at 3.

[65]The eyewitness at the scene, Pat Miller (hereinafter, "Mr. Miller"), used to work for Mr. Alderman. *See* Doc. No. 62, lines 2-3 at pg.185. In addition, he lives, or at least used to live in the same neighborhood as Mr. Alderman. *See id.* at lines 11-12 at pg. 185. They are friends. *See id.*, lines 18-19 at pg. 192.

On the night of the collision, Mr. Miller, did not come forward as a witness. *See id.* lines 23-25 at pg. 191. At that point in time, he didn't "want to be a part of it." *Id.*, line 25 at pg. 191. It was not until after he discovered that his former employer and neighbor Mike Alderman was involved, that he decided to come forward. *See id.*, lines 3-19 at pg. 192. Mr. Miller describes his revelation as follows:

> I ran into Mike at the -- at an auto parts store, since we both still live in the same neighborhood and are in the same business. So, I hadn't seen him in a long time, wondered why I hadn't seen him in a long time. But, anyway, I ran into him. We were just kind of, you know, hashing over old stories and stuff, and he began telling me the story of what happened on my street. And I was real surprised, and I just said, Mike, I said, you're not going to believe this, I said, but I actually was out there that night. And . . .

Id., lines 11-16 at 185.

[66]*See* Doc. No. 62, lines 6-7 at 195.

[67]*See* Plaintiff's March 21, 2003 Answers to Defendants' 1st Set of Interrogatories, ¶ 7 at 3. Once again, the Defendant Officers offer a different account of the incident. According to Officers Osborne and Silverman, they approached Mr. Alderman, verbally identified themselves as police officers, and instructed him to get out of the vehicle. *See* Osborne Affidavit, ¶23 at 5; Silverman Affidavit, ¶23 at 6. Mr. Alderman was told that he was under arrest. *See* Osborne Affidavit, ¶23 at 5. Mr. Alderman did not comply; therefore, they removed him from the Bronco, placed him on the ground, and handcuffed him. *See* Osborne Affidavit, ¶23 at 5; Silverman Affidavit, ¶23 at 6. At no time, did any of the Officers kick or strike Mr. Alderman. *See* McDermott Affidavit, ¶27 at 7; Osborne Affidavit, ¶23 at 5; Silverman Affidavit, ¶23 at 6.

[68]*See* Plaintiff's March 21, 2003 Answers to Defendants' 1st Set of Interrogatories, ¶ 7 at 3.

At or about that time, Mr. Alderman heard one of the officers ask another: "Why did you hit him?"[69] The other officer replied: "I thought he was getting away."[70]

Ultimately, the Defendant Officers identified the driver of the Bronco as Mr. Alderman.[71] And although, at the time of his arrest, Mr. Alderman was not wearing eyeglasses,[72] and was fully clothed in blue jeans, tennis shoes, and either a button-up or polo shirt,[73] Officer Silverman positively identified him as the naked, white man who walked by his vehicle earlier that night.[74] In addition, the two young women who witnessed the naked man outside Roxy's identified Mr. Alderman as the perpetrator.[75] In a sworn affidavit, both of them stated that they were 90% sure that he was the culprit.[76]

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[69]*Id.*

[70]*Id.*

[71]*See* McDermott Affidavit, ¶21 at 6; Osborne Affidavit, ¶24 at 5; Silverman Affidavit, ¶24 at 6.

[72]*See* Testimony of Officer Silverman (Doc. No. 58), lines 17-22 at pg. 49.

[73]*See* Doc. No. 45, line 25 at pg. 70 through line 4 at pg. 71.

[74]*See* Silverman Affidavit, ¶24 at 6.

[75]*See* McDermott Affidavit, ¶23 at 6-7; June 30, 2000 Affidavit of Tara Berry; June 30 2000 Affidavit of Shannon Nydam.

[76]*See* June 30, 2000 affidavit of Tara Berry ("90% out of 100% I believe it was him"); *see also* June 30, 2000 affidavit of Shannon Nydam ("I was 90% sure that [he] was the man that I saw"). The eye witnesses' identification of Mr. Alderman as the wrongdoer is problematic. Following the collision, an officer from the Orlando Police Department transported the witnesses to the scene of the accident where they were asked to "go identify the guy." Doc. No. 63, lines 22-23 at pg. 17 and lines 1-10 at pg. 50; *see also* Doc. No. 64, line 11 at pg. 14 through line 6 at pg. 15. They then proceeded to the back of an ambulance where Mr. Alderman was lying on a stretcher. *See* Doc. No. 63, lines 5-6 at pg. 18 & lines 11-13 at pg. 49; *see also* Doc. No. 64, lines 7 through 24 at pg. 15. In the ambulance, Mr. Alderman was clothed and covered. *See* Doc. No. 63, lines 6-7 and 22-25 at pg. 19; *see also* Doc. No. 64, line 25 at pg. 15 through line 3 at pg. 16. In addition, he had some kind of stabilizing device around his neck. *See* Doc. No. 63, lines 14-17 at pg. 49. The witness, Tara Berry, nevertheless identified Mr. Alderman (from the rear of the ambulance) as the naked man: "I guess I recognized him being like his body shape, I guess. I don't know. Because I saw him naked so." *Id.*, lines 3-5

(continued...)

[76](...continued)
at pg. 19. Likewise, Shannon Nydam (from the rear of the ambulance) identified Mr. Alderman as the naked man:

Q. All right. And when you say "it must be him," why did you make that statement?

A. Because it was the same body type that I had seen, the same, you know --

Q. Shape, body shape is that what --

A. Yes.

Q. I mean, I don't want to put words in your mouth. When you say body type --

A. Well, it's the same -- because really I didn't get to see much of his features because he was across the street.

Q. Features being the face?

A. Facial features, eye color, stuff like that.

Q. All right.

A. So just what I remember of like how tall he was and, you know, how skinny he was and that he was white.

Q. So you're -- and I don't want to put words in your mouth, but are you basing your identification then on the body shape and structure?

A. Yes.

Q. All right. So you can't say that the face is the same?

A. I really didn't see his face and I wouldn't know.

Q. That's fair.

Doc. No. 64, line 4 at pg.16 through line 2 at pg. 17. Incidentally, in order to overcome any hesitancy on the part of the witnesses to write a written statement identifying Mr. Alderman as the wrongdoer, the Defendants' intimated that the young women would not have to go to trial:

A. Well, we [Tara Berry and Shannon Nydam] told them that we didn't want to go to trial. They said, well, if you write a statement, you won't have to go to trial. So we

(continued...)

Because Mr. Alderman complained of injuries, Orange County Fire Rescue was called to the scene.[77] Once they arrived, Mr. Alderman was transported to a hospital.[78] There, he was x-rayed and given several pain shots.[79] He was then discharged and taken to Orange County Corrections.[80] Mr. Alderman remained incarcerated for ten days until he was able to bond out.[81] As a result of his encounter with the Defendants, he "sustained injuries and pain [] [to his] left knee, [his] left shoulder, [his] neck and [his] side, and the mid-portions of [his] body where [he] was kicked by one of the [D]efendants."[82]

At the conclusion of their investigation, the Defendant Officers caused Mr. Alderman to be charged with numerous criminal violations: (1) effecting an improper lane change into oncoming traffic; (2) failing to obey a traffic control device; (3) reckless driving; (4) assault with a deadly weapon against a law enforcement officer; (5) loitering and prowling; and (6) engaging in lewd and lascivious behavior.[83] However, Mr. Alderman's

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[76](...continued)

said, okay, then we'll write the statement. So then they said, well, can you identify that this is the man that did it.

Doc. No. 64, line 25 at pg. 14 through line 4 at pg. 15; *see also* Doc. No. 63, line 25 at pg. 15 through line 12 at pg. 16.

[77]*See* McDermott Affidavit, ¶22 at 6; Silverman Affidavit, ¶25 at 6.

[78]*See* McDermott Affidavit, ¶22 at 6.

[79]*See* Doc. No. 45, lines 7-10 at pg. 37.

[80]*See* McDermott Affidavit, ¶22 at 6.

[81]*See* Doc. No. 45, line 24 at pg. 37 through line 3 at pg. 38.

[82]*See* Plaintiff's March 21, 2003 Answers to Defendants' 1st Set of Interrogatories, ¶ 10 at 5.

[83]*See* Doc. No. 16, ¶¶ 15-18 at 4-5; *see also* Defendant Juan McDermott's Answer to Amended (continued...)

prosecution ultimately proved unsuccessful.[84] The State Attorney entered a *nolle prosequi* on the charges of aggravated assault and lewd and lascivious conduct;[85] Mr. Alderman was acquitted on the reckless driving charge;[86] and a state court judge granted Mr. Alderman's Motion for Judgment of Acquittal on the loitering and prowling charge.[87]

Against that backdrop, Mr. Alderman filed this lawsuit against the Defendants in the United States District Court for the Middle District of Florida.[88] The seven count[89] Amended Complaint alleges constitutional violations against the City of Orlando (Count I), negligence against the City of Orlando (Count II), constitutional violations against Officer McDermott (Count III), assault and battery against Officer McDermott (Count IV), false arrest against Officer McDermott (Count V), constitutional violations against Officer Osborne (Count VI),

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[83](...continued)
Complaint (Doc. No. 17), ¶ 13 at 2; Defendant Douglas A. Osborne's Answer to Amended Complaint (Doc. No. 18), ¶13 at 2; Defendant John J. Silverman's Answer to Amended Complaint (Doc. No. 19), ¶13 at 2; and Defendant ,City of Orlando, Florida, Answer to Amended Complaint (Doc. No. 22), ¶13 at 2.

[84]*See* Doc. No. 16, ¶¶19-22 at 5; *see also* Doc. No. 17, ¶ 13 at 2; Doc. No. 18, ¶13 at 2; Doc. No. 19, ¶13 at 2; and Doc. No. 22, ¶13 at 2.

[85]*See* Doc. No. 16, ¶¶ 19 & 21 at 5; *see also* Doc. No. 17, ¶ 13 at 2; Doc. No. 18, ¶13 at 2; Doc. No. 19, ¶13 at 2; and Doc. No. 22, ¶13 at 2.

[86]*See* Doc. No. 16, ¶ 20 at 5; *see also* Doc. No. 17, ¶ 13 at 2; Doc. No. 18, ¶13 at 2; Doc. No. 19, ¶13 at 2; and Doc. No. 22, ¶13 at 2.

[87]*See* Doc. No. 16, ¶ 22 at 5; *see also* Doc. No. 17, ¶ 13 at 2; Doc. No. 18, ¶13 at 2; Doc. No. 19, ¶13 at 2; and Doc. No. 22, ¶13 at 2.

[88]*See generally* Doc. No. 16.

[89]The Complaint alleges seven counts, but the last count is misnumbered VIII.

and malicious prosecution and constitutional violations against Officer Silverman (Count VII).[90]

Turning to the issue at hand, the Defendants now move this Court to enter summary judgment against the Plaintiff.[91] According to the Defendants, they are entitled to judgment as a matter of law because: (1) the Plaintiff has failed to allege a sufficient predicate for municipal liability; (2) the Defendant Officers had probable cause to effect Mr. Alderman's arrest; and (3) that in any event, the Defendant Officers are entitled to qualified immunity.[92]

III. STANDARD OF REVIEW

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no

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[90]See *generally* Doc. No. 16. In the Amended Complaint, the Plaintiff alleges violations of the Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. *See id.*, ¶1 at 1. A careful review of the pleadings, however, establishes that only the Fourth Amendment is applicable. A false arrest, for example, violates the proscriptions of the Fourth Amendment. *See Redd v. City of Enterprise*, 140 F. 3d 1378, 1382 (11th Cir. 1998) ("It is clearly established that an arrest made without probable cause violates the Fourth Amendment") (internal citation omitted). Likewise, malicious prosecution is purely a Fourth Amendment claim. *See Wood v. Kesler*, 323 F. 3d 872, 881 (11th Cir. 2003), *cert. denied*, 157 L. Ed. 2d 143, 124 S. Ct. 298 (2003). The "substantive due process component of the Fourteenth Amendment [does] not provide the constitutional source of a right to be free from malicious prosecution." *Id.* at 882 n. 14 (citing *Albright v. Oliver*, 510 U.S. 266, 274-75 (1994) (plurality opinion)). Finally, "all claims that law enforcement officers have used excessive force - deadly or not - in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard." *Carr v. Tatangelo*, 338 F. 3d 1259, 1267 n. 15 (11th Cir. 2003) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)). Since "the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, [and] not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Id.* (internal citation omitted). In sum, "if a constitutional claim is covered by a specific constitutional provision, such as the Fourth . . . Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process" or the Eighth Amendment. *County of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998) (internal citation omitted).

[91]*See generally* Docs. No. 33 and 34.

[92]*See generally* Doc. No. 34.

genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material if it is one that might affect the outcome of the case. *See id.* The party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those materials that demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Once the movant satisfies this requirement, the burden shifts to the non-moving party to "come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 584 (1986). To meet this burden, the non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings." Fed. R. Civ. P. 56(e). Nor may the non-moving party rely on a mere scintilla of evidence supporting its position. *See Walker v. Darby,* 911 F. 2d 1573, 1577 (11th Cir. 1990). Rather, for a court to find a genuine issue for trial, the non-moving party must establish, through the record presented to the court, that it is capable of providing evidence sufficient for a reasonable jury to return a verdict in its favor. *See Cohen v. United Am. Bank,* 83 F. 3d 1347, 1349 (11th Cir. 1996). When a court considers whether or not to enter summary judgment, it views all of the evidence, and all inferences drawn therefrom, in the light most favorable to the non-moving party. *See Hairston v. Gainesville Sun Publ'g Co.,* 9 F. 3d 913, 918 (11th Cir. 1993).

IV. LEGAL ANALYSIS

A. FALSE ARREST

The Plaintiff first alleges that the Defendant Officers are liable for false arrest under 42 U.S.C. § 1983.

"Plainly, an arrest without probable cause violates the right to be free from an unreasonable search under the Fourth Amendment" to the United States Constitution. *See Storck v. City of Coral Springs*, 354 F. 3d 1307, 1314 (11th Cir. 2003) (internal citations omitted). "However, if an officer has probable cause to believe that an individual has committed even a *very minor criminal offense in his presence*, [then] he may, without violating the Fourth Amendment, arrest the offender." *Id.* (internal citation and quotation marks omitted) (emphasis added).

Probable cause exists "when an arrest is objectively reasonable based on the totality of the circumstances." *Durruthy v. Pastor*, 351 F. 3d 1080, 1088 (11th Cir. 2003) (internal citations and quotation marks omitted). An arrest is objectively reasonable "when the facts and circumstances within the officer's knowledge, of which he or she has reasonably trustworthy information, would cause a prudent person to believe, under the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Id.* (internal citation omitted).

Applying this standard, the Court finds that the Defendant Officers had probable cause to arrest Mr. Alderman.

In the early morning hours of June 30, 2000, Officer McDermott[93] witnessed a two-toned Ford Bronco driven by a white male pull into an empty church parking lot. Shortly thereafter, Officer Silverman observed a naked white male in the vicinity. When the naked white male vanished, the two-toned Ford Bronco reemerged. Officer McDermott then investigated, locating the suspicious Bronco (unoccupied and with the windows down) in a parking lot behind a closed auto-body repair shop. After confirming that the Bronco had been recently driven, Officer McDermott heard women screaming in the distance. The women had observed a naked white male in the area masturbating. Less than two (2) minutes later, the two-toned Bronco emerged again hurriedly driving out from the area where the naked man had gone.

Taken together, these facts and circumstances establish the existence of probable cause. Other than criminal wrongdoing, there was simply no logical explanation for the unusual emergence of the two-toned Bronco both directly before and after the commission of these consecutive criminal offenses. *See United States v. Espinosa-Orlando*, 704 F. 2d 507, 511 (11th Cir. 1983) ("Probable cause may also be supplied by the 'observation of unusual activities where there is no legitimate, logical explanation'") (internal citation omitted). This is particularly apparent when considering the witness' statements, and Officer McDermott's observation of the Bronco unoccupied simultaneously with the naked man

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[93]Although the Defendant Officers did not witness each of the events taking place that evening, they reported to each other via radio at all relevant times, and the "fellow officer rule allows an arresting officer to assume probable cause to arrest a suspect from information supplied by other officers." *Voorhees v. Florida*, 699 So. 2d 602, 609 (Fla. 1997) (citing *Whiteley v. Warden, Wyoming State Penitentiary*, 401 U.S. 560 (1971)).

appearing in front of the Roxy. Given these facts, a reasonable prudent person would have believed that the suspect (Mr. Alderman) engaged in either loitering and/or prowling in violation of Fla. Stat. § 856.021,[94] or lewd and lascivious conduct in violation of Fla. Stat. § 798.02.[95]

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[94]Fla. Stat. § 856.021 provides, in relevant part:

> (1) It is unlawful for any person to loiter or prowl in a place, at a time or in a manner not usual for law-abiding individuals, under circumstances that warrant a justifiable and reasonable alarm or immediate concern for the safety of persons or property in the vicinity.
>
> (2) Among the circumstances which may be considered in determining whether such alarm or immediate concern is warranted is the fact that the person takes flight upon appearance of a law enforcement officer, refuses to identify himself or herself, or manifestly endeavors to conceal himself or herself or any object. Unless flight by the person or other circumstances makes it impracticable, a law enforcement officer shall, prior to any arrest for an offense under this section, afford the person an opportunity to dispel any alarm or immediate concern which would otherwise be warranted by requesting the person to identify himself or herself and explain his or her presence and conduct. No person shall be convicted of an offense under this section if the law enforcement officer did not comply with this procedure or if it appears at trial that the explanation given by the person is true and, if believed by the officer at the time, would have dispelled the alarm or immediate concern.
>
> (3) Any person violating the provisions of this section shall be guilty of a misdemeanor of the second degree . . .

To violate Fla. Stat. § 856.021, therefore, an individual: (1) "must be loitering or prowling at a place, at a time, or in a manner not usual for law-abiding citizens; and (2) the loitering or prowling must be under circumstances that warrant a reasonable fear for the safety of persons or property in the vicinity." *United States v. Gordon*, 231 F. 3d 750, 758 (11th Cir. 2000) (internal citation omitted), *cert. denied*, 531 U.S. 1200 (2001).

In this instance, the facts and circumstances indicate that the suspect was loitering or prowling in a manner not usual for law-abiding citizens: he was naked. In addition, the facts indicate that the suspect was loitering or prowling under circumstances that warranted a reasonable fear for the safety of persons in the vicinity. Given his presence near a nightclub, he was almost certain to run into bystanders, especially at 2:00 a.m. on a Friday morning (bar closing time in Orlando).

[95]Fla. Stat. § 798.02 provides, in relevant part:

(continued...)

The fact that the Defendant Officers failed to record the tag number of the Bronco, or otherwise insure that it was unequivocally the same vehicle that was appearing and reappearing in conjunction with the criminal offenses (such as by returning to the site where Officer McDermott inspected the Bronco to determine if that Bronco was the same Bronco that later left the scene of the crime) does not change this analysis. Nor does that fact that Mr. Alderman was fully clothed and without eyeglasses at the time of his arrest. Absolute certainty is not an element of probable cause. *See Dahl v. Holley*, 312 F. 3d 1228, 1234 (11th Cir. 2002). Instead, "[s]ufficient probability . . . is the touchstone of reasonableness under the Fourth Amendment." *Id.* (internal citations omitted); *see also Durruthy*, 351 F. 3d at 1088 ("Although probable cause requires more than suspicion, it does not require convincing proof, and need not reach the [same] standard of conclusiveness and probability of facts necessary to support a conviction") (internal citation and quotation marks omitted); *Brescher v. Von Stein*, 904 F. 2d 572, 578 n.9 (11th Cir. 1990) ("'Probable cause' defines a radically different standard than 'beyond a reasonable doubt', and while an arrest must stand on more than suspicion, the arresting officer need not have in hand evidence sufficient to obtain a conviction") (internal citation omitted).

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[95](...continued)

> [I]f any man or woman, married or unmarried, engages in open and gross lewdness and lascivious behavior, they shall be guilty of a misdemeanor of the second degree.

Under the specific facts and circumstances of this case, the suspect's conduct gave rise to probable cause that he was engaging in lewd and lascivious behavior.

Equally unavailing is that the Defendants failed to acquire conclusive evidence of each element of the offenses of loitering and prowling and/or lewd and lascivious conduct before effecting Mr. Alderman's arrest. Police officers are not prosecutors, and, as a result, "[p]robable cause does not require the same type of specific evidence of each element of the offense as would be *needed to support a conviction*." *Holmes v. Kucynda*, 321 F. 3d 1069, 1079 (11th Cir. 2003) (internal citation omitted) (emphasis added).

Assuming *arguendo* that the Defendant Officers lacked probable cause to arrest Mr. Alderman on June 30, 2000, this Court alternatively finds that arguable probable cause existed. "An officer sued for having made an arrest without probable cause is entitled to qualified immunity if there was *arguable probable cause* for the arrest, which is a more lenient standard than probable cause." *Knight v. Jacobson*, 300 F. 3d 1272, 1274 (11th Cir. 2002) (internal citations omitted) (emphasis added). "Arguable probable cause exists 'where reasonable officers in the same circumstances and possessing the same knowledge as the Defendant[s] *could have believed* that probable cause existed to arrest.'" *Lee v. Ferraro*, 284 F. 3d 1188, 1195 (11th Cir. 2002) (internal citations omitted) (emphasis added). Therefore, "[e]ven law enforcement officers who reasonably *but mistakenly conclude* that probable cause is present are entitled to immunity." *Wood v. Kesler*, 323 F. 3d 872, 878 (11th Cir. 2003) (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991)) (emphasis added), *cert. denied*, 157 L. Ed. 2d 143, 124 S. Ct. 298 (2003); *see also Scarbrough v. Myles*, 245 F. 3d 1299, 1302-03 (11th Cir. 2001) ("Arguable probable cause does not require an arresting officer to prove every element of a crime or to obtain a confession before making an arrest, which

would negate the concept of probable cause and transform arresting officers into prosecutors").

Since probable cause existed as to at least one offense, it is unnecessary to examine whether probable cause existed with respect to the remaining offenses. *See Stachel v. City of Cape Canaveral*, 51 F. Supp. 2d 1326, 1331 (M.D. Fla. 1999) ("The claim for false arrest does not cast its primary focus on the validity of each individual charge; instead we focus on the validity of the arrest. If there is probable cause for any of the charges made . . . then the arrest was supported by probable cause, and the claim for false arrest fails") (quoting *Wells v. Bonner*, 45 F. 3d 90, 95 (5th Cir. 1995)). An arrest is a single, indivisible event. *See id; see also Lee*, 284 F. 3d 1188 at 1196 ("[W]hen an officer makes an arrest, which is properly supported by probable cause to arrest for a certain offense, neither his subjective reliance on an offense for which no probable cause exists nor his verbal announcement of the wrong offense vitiates the arrest") (internal citation omitted); *Knight v. Jacobson*, 300 F. 3d 1272, 1275 n. 2 (11th Cir. 2002) (accord).[96]

B. MALICIOUS PROSECUTION

Like false arrest, malicious prosecution is a viable constitutional tort under 42 U.S.C. § 1983. *See Wood v. Kesler*, 323 F. 3d 872, 881 (11th Cir. 2003).

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[96]Since the Defendant Officers had probable cause to effect Mr. Alderman's arrest, his detention pursuant to that arrest was also not unconstitutional. *See Ortega v. Christian*, 85 F. 3d 1521, 1526 (11th Cir. 1996) ("Where a police officer lacks probable cause to make an arrest, the arrestee has a claim under section 1983 for false imprisonment based on a detention pursuant to that arrest") (internal citation omitted).

To recover on that theory, "the plaintiff must prove [both] a violation of his Fourth Amendment right to be free from unreasonable seizures in addition to the elements of the common law tort of malicious prosecution." *Id.* (internal citations omitted).

For purposes of § 1983, the common law elements of the tort of malicious prosecution are gleaned from both federal and state law. *See id.* In a federal court sitting in Florida, therefore, the elements entail: (1) the institution of or continuation of a criminal prosecution by the present defendant against the present plaintiff; (2) with malice and without probable cause; (3) that consummated in a bona fide termination in the plaintiff accused's favor; (4) causing damage to the plaintiff accused. *See id.* at 882; *see also Alamo Rent-A-Car, Inc.* v. *Mancusi*, 632 So. 2d 1352, 1355 (Fla. 1994) (accord); *Burns v. GCC Beverages, Inc.*, 502 So. 2d 1217, 1218 (Fla. 1986) (accord). Importantly, "although both state and federal law help inform the elements of the common law tort of malicious prosecution, a Fourth Amendment malicious prosecution claim under § 1983 remains a federal constitutional claim, and its elements and whether they are met ultimately are controlled by federal law." *Wood*, 323 F. 3d at 882 (internal citation omitted).

In this instance, the undisputed facts are that the Defendants caused a criminal prosecution against the Plaintiff (element one) subjecting the Plaintiff to financial loss (element four). *See* Doc. No. 16, ¶¶ 15-18 at 4-5; Doc. No. 17, ¶ 13 at 2; Doc. No. 18, ¶13 at 2; Doc. No. 19, ¶13 at 2; Doc. No. 22, ¶13 at 2; *Salmon v. Salmon (In re Salmon)*, 128 B.R. 313, 316 (Bankr. M.D. Fla. 1991) ("In a malicious prosecution case . . . [t]he plaintiff may recover for any financial loss resulting to him directly from the prosecution and may recover

for injuries suffered in respect of his business") (internal citations omitted), *aff'd*, 49 F. 3d 732 (11th Cir. 1995).

It is also undisputed that the prosecution terminated in the Plaintiff's favor (element three). *See Uboh v. Reno*, 141 F. 3d 1000, 1005 (11th Cir. 1998) ("courts have found favorable termination to exist by virtue of an acquittal, an order of dismissal reflecting an affirmative decision not to prosecute, a dismissal based on the running of the statute of limitations, an entry of a nolle prosequi, and, in some cases, a granted writ of habeas corpus") (internal citations omitted).

Finally, this Court finds that a reasonable jury could conclude that the Defendants acted with malice and without probable cause in prosecuting the Plaintiff (element two).[97]

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[97]This Court found that probable cause existed to arrest Mr. Alderman for loitering, prowling, and lewd and lascivious conduct. *See supra*. For the same reasons, this Court finds that probable cause existed to prosecute Mr. Alderman on those charges. Accordingly, this analysis will focus only on the charges of reckless driving in violation of Fla. Stat. § 316.192(1), and aggravated assault with a deadly weapon in violation of Fla. Stat. §§ 784.021(1)(a); 784.07(2)(c); and 775.0823(10). Mr. Alderman was acquitted on the charge of reckless driving, and the State Attorney filed a *nolle prosequi* on the charge of aggravated assault with a deadly weapon. *See* Doc. No. 16, ¶¶ 19-20 at 5; *see also* Doc. No. 17, ¶ 13 at 2; Doc. No. 18, ¶13 at 2; Doc. No. 19, ¶13 at 2; Doc. No. 22, ¶13 at 2.

Fla. Stat. § 316.192(1) provides, in relevant part:

(1) Any person who drives any vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving.

Fla. Stat. § 784.021(1)(a) provides, in relevant part:

(1) An "aggravated assault" is an assault:

(a) With a deadly weapon without intent to kill; or

(b) With an intent to commit a felony.

(continued...)

"In order to establish the presence of malice in a malicious prosecution action, [a] plaintiff may prove either actual malice or legal malice." *Moran v. Corr. Servs. Corp.*, 2002 U.S. Dist. Lexis 26507, *17 (S.D. Fla. 2002) (citing *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1357 (Fla. 1994)). "Legal malice may be inferred from, among other things, *a lack of probable cause*, gross negligence, or great indifference to persons, property, or the rights of others." *Id.* (citing *Mancusi* at 1357) (emphasis added).

Viewed in the light most favorable to the Plaintiff, the facts and circumstances in this instance (*i.e.*, Mr. Alderman's testimony, Tara Berry's testimony, and Shannon Nydam's testimony) indicate that Officer McDermott never stood in the middle of the road, held out his badge, and shouted "Police! Stop!" while the Plaintiff drove at him. The Defendant

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[97](...continued)

(2) Whoever commits an aggravated assault shall be guilty of a felony of the third degree.

Fla. Stat. § 784.07(2)(c) provides, in relevant part:

> (2) Whenever any person is charged with knowingly committing an assault or battery upon a law enforcement officer . . . while the officer . . . is engaged in the lawful performance of his or her duties, the offense for which the person is charged shall be reclassified as follows:
>
> (c) In the case of aggravated assault, from a felony of the third degree to a felony of the second degree. Notwithstanding any other provision of law, any person convicted of aggravated assault upon a law enforcement officer shall be sentenced to a minimum term of imprisonment of 3 years.

Fla. Stat. § 775.0823(10) provides, in relevant part:

> The legislature does hereby provide for an increase and certainty of penalty for any person convicted of a violent offense against any law enforcement . . . officer which offense arises out of or in the scope of the officer's duty as a law enforcement or correctional officer . . . as follows:
>
> (10) For aggravated assault . . . a sentence pursuant to s. 775.082, s. 775.083, or s. 775.084.

Officers nonetheless "caused [Mr.] Alderman to be charged with . . . knowingly making an assault upon [Officer] McDermott, a law enforcement officer, with a motor vehicle, a deadly weapon[,] and intentionally threatening to do violence to [Officer] McDermott with a motor vehicle." *See* Doc. No. 16, ¶ 16 at 4; *see also* Doc. No. 17, ¶ 13 at 2; Doc. No. 18, ¶13 at 2; Doc. No. 19, ¶13 at 2; Doc. No. 22, ¶13 at 2. If the jury believes the Plaintiff's version of the facts, then it could reasonably conclude that the Defendant Officers acted with malice and without probable cause in prosecuting Mr. Alderman.

Similarly, a jury could reasonably conclude that the Defendant Officers acted with malice and without probable cause in prosecuting Mr. Alderman for reckless driving (*i.e.*, abruptly turning into oncoming lanes of traffic, cutting across parking lots at a high rate of speed, engaging in high speed u-turns, and crashing into Officer McDermott's unmarked police vehicle). *See* Trial Testimony of Officer Osborne and Officer McDermott in Reckless Driving Jury Trial before the Honorable James E. Glatt (Doc. No. 62).

Also, since under the Plaintiff's version of the facts, the Defendant Officers offered false testimony to obtain a conviction on which they lacked even arguable probable cause, a jury could reasonably find a Fourth Amendment violation.

However, because police officers are afforded *absolute immunity*[98] from a §1983

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[98]"In § 1983 cases, absolute immunity is accorded to functions intimately associated with the judicial phase of the criminal process." *Scarbrough*, 245 F. 3d 1299 at 1305 (internal citation and quotation marks omitted). This encompasses police testimony given in grand jury proceedings, pre-trial depositions, and criminal trials. *See Jones*, 174 F. 3d 1271 at 1286. In this instance, the Plaintiff's claim for malicious prosecution is predicated on allegedly false statements made in relation to functions intimately associated with the judicial phase of Mr. Alderman's criminal process. Accordingly, absolute immunity applies.

civil damages action predicated on false testimony, the Plaintiff's malicious prosecution claim necessarily fails. *See Jones v. Cannon*, 174 F. 3d 1271, 1286 (11th Cir. 1999) (recognizing that a detective was entitled to absolute immunity from a § 1983 civil damages action predicated on testimony given before a grand jury, in pre-trial depositions, and at trial, even if it was false) (internal citations omitted). *See id.* Concluding otherwise would require law enforcement officers to answer in court each time a disgruntled defendant charged them with perjury, diverting their resources "from the pressing duty of enforcing the criminal law."*Id.* (internal citation omitted). "As with any witness testifying under oath, the penalty for false testimony is the potential prosecution for perjury." *Scarbrough v. Myles*, 245 F. 3d 1299, 1305 (11th Cir. 2001) (internal citations omitted).[99]

C. THE EXCESSIVE FORCE CLAIM

1. THE PLAINTIFF'S ARREST

The Plaintiff next alleges that, following the collision, the Defendant Officers employed excessive force in effecting his arrest.

"The Fourth Amendment's freedom from unreasonable searches and seizures encompasses the plain right to be free from the use of excessive force in the course of an arrest." *Durruthy v. Pastor*, 351 F. 3d 1080, 1093 (11th Cir. 2003) (internal citation omitted). "[N]ot every push or shove, [however,] even if it may later seem unnecessary in the peace of

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[99]Although a police officer may be liable for failing to prevent a fellow police officer's unconstitutional conduct, this is not the case when the unconstitutional conduct consists of giving false testimony in connection with the judicial phase of the criminal process. *See Jones*, 174 F. 3d 1271 at 1289. After all, to allow a § 1983 claim based on the failure to prevent allegedly perjured testimony "where the allegedly perjured testimony itself is cloaked in absolute immunity would be to permit through the back door what is prohibited through the front." *Id.*

the judge's chambers, violates the Fourth Amendment." *Saucier v. Katz*, 533 U.S. 194, 209 (2001) (internal citation omitted). As the Eleventh Circuit has repeatedly recognized, "the application of *de minimis* force, without more, will not support a claim for excessive force." *Durruthy*, 351 F. 3d at 1094 (internal citation omitted) (emphasis added).

The decisions rendered in *Vinyard v. Wilson*, 311 F. 3d 1340 (11th Cir. 2002), *Nolin v. Isbell*, 207 F. 3d 1253 (11th Cir. 2000), and *Jones v. City of Dothan*, 121 F. 3d 1456 (11th Cir. 1997) are instructive on this point. In *Vinyard*, the appellate court concluded that where an officer grabbed the plaintiff's arm, jerked her out of a chair, handcuffed her behind her back, and later dragged her into the jail by either her shirt, arm, or hair, the force applied was *de minimis*. *See id.*, 311 F. 3d 1340, 1349 n.13. Likewise, in *Nolin*, the appellate court concluded that where an officer grabbed the plaintiff from behind by the shoulder and wrist, threw him against a van, kneed him in the back, pushed his head into the side of the van, searched his groin in an uncomfortable manner, and handcuffed him, the force applied was *de minimis*. *See id.*, 207 F. 3d at 1258-59. Finally, in *Jones*, the appellate court concluded that where an officer slammed the plaintiff against a wall, kicked his legs apart, required him to put his arms above his head, and pulled his wallet from his pants, the force applied was *de minimis* notwithstanding any pain the plaintiff experienced from "having to lift his arms since he had previously suffered a stroke," and notwithstanding any pain the plaintiff experienced from "his arthritic knee from having his legs kicked apart." *Id.* at 121 F. 3d at 1460. Incidentally, the claimant in *Jones*, like the Plaintiff here, received minor medical treatment for his injuries. *See also Durruthy v. Pastor*, 351 F. 3d 1080, 1094 (11th Cir. 2003)

(finding force *de minimis* where officer grabbed plaintiff from behind, forced plaintiff to the ground, and handcuffed plaintiff); *Gold v. City of Miami*, 121 F. 3d 1442, 1146-47 (11th Cir. 1997) (finding force *de minimis* where officer handcuffed plaintiff too tightly and refused to loosen cuffs for more than twenty minutes), *cert. denied*, 525 U.S. 870 (1998); *Post v. City of Fort Lauderdale*, 7 F. 3d 1552, 1559 (11th Cir. 1993) (finding force *de minimis* where officer pushed plaintiff against wall while handcuffed).

Viewed in the light most favorable to the Plaintiff, the facts and circumstances here indicate that Officer Silverman, in effecting the Plaintiff's arrest: (1) forcibly removed him from his vehicle; (2) slammed him onto the ground; (3) aimed a gun at the side of his head;[100] and (4) kicked him in his side causing pain and injury to the mid-portions of his

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[100]In *Jackson v. Sauls*, the Eleventh Circuit Court of Appeals concluded that an "officer's drawing a weapon and ordering a person stopped to lie on the ground does not necessarily constitute excessive force." 206 F. 3d 1156, 1171-72 (11th Cir. 2000) (internal citation omitted). Instead, such a determination involves a fact-specific inquiry dependent on the "the exigencies of the immediate situation and the officers' being forced to make split-second decisions." *Id.* at 1171.

In *Sauls*, defendant police officers, operating undercover in plain clothes and in an unmarked vehicle, pulled alongside of the plaintiffs' vehicle, a blue Pontiac 6000. *See id.* at 1160. According to the defendants, this caused the occupants of the plaintiffs' vehicle to become nervous. *See id.* The defendants attributed this nervousness to their assumptions that the occupants recognized defendants as police officers. *See id.* While the officers' car continued on, the plaintiffs' vehicle turned into the parking lot of the Moto Cycle Shop. *See id.* at 1161. They then entered the shop to check on a motorcycle repair estimate. *See id.*

Realizing that the plaintiffs' vehicle was no longer behind them, the defendant officers turned around and drove into the parking lot next to the Moto Cycle Shop. *See id.* Allegedly, they were suspicious that the plaintiffs' vehicle had been stolen. *See id.* The defendants' premised their suspicion on the nervousness of the occupants of the vehicle, their knowledge that the plaintiffs' vehicle was an easy car to steal, and their observation that the plaintiffs' vehicle made an abrupt turn into the parking lot of the Moto Cycle Shop. *See id.* There was no physical evidence indicating that plaintiffs' vehicle had been stolen, however: there were no broken windows, the ignition was intact, and no door was ajar. *See id.* Moreover, the officers had no outside information that the plaintiffs had committed any criminal acts or were about to commit any criminal acts. *See id.*

(continued...)

body. Plaintiff's March 21, 2003 Answers to Defendants' 1st Set of Interrogatories, ¶¶7-8 & 10 at pgs. 2-5.

While arguably inappropriate in hindsight, the minimal amount of force and injury present here is akin to that applied and sustained in *Vinyard*, *Nolan*, and *Jones*; it is *de minimis*. Accordingly, the Defendant Officers are entitled to summary judgment on this claim. "[A] minimal amount of force and injury, as present in the facts of this case, will not

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[100](...continued)

Approximately one minute after the defendants arrived at the parking lot of the Moto Cycle Shop, a two-car wreck occurred at a nearby intersection prompting the people inside of the Shop, including the plaintiffs, to walk outside. *See id.* at 1162. When the plaintiffs walked outside, the defendant officers recognized them as the occupants of the blue Pontiac 6000. *See id.* Accordingly, the defendant officers drew their guns, and yelled and cursed at everyone to get back into the Moto Cycle Shop and lie down. *See id.* The defendant officers then proceeded to sweep the Moto Cycle Shop with their guns. *See id.* At no time did they identify themselves as police officers. *See id.*

Believing the defendant officers were armed robbers about to harm the Shop's occupants, a mechanic drew his nine millimeter handgun and fired a three-round burst at one of the defendants. *See id.* at 1162. A shootout then ensued, killing one and injuring others. *See id.* at 1162-63.

Finding that "if the stop was legal, then Plaintiffs have failed to show any threat of excessive force during that stop" the appellate court concluded that there was no constitutional violation in that regard. *Id.* at 1172. The appellate court further found that "[a]t a minimum . . . [the] Plaintiffs have not shown that a reasonable police officer, making this legal stop, would have known that drawing his gun and ordering Plaintiffs to lie on the ground violated Plaintiffs' clearly established rights." *Id.* Therefore, said the appellate court, the defendant officers were entitled to summary judgment on the plaintiffs' claims that the officers' threat of force during this stop was excessive. *See id.*; *see also Courson v. McMillian*, 939 F. 2d 1479, 1495-96 (11th Cir. 1991) (finding that law enforcement officer did not use excessive force in investigatory stop by requiring female companion of two males, who were later arrested, to lie face down with a shotgun pointed at her for one half hour).

Following *Sauls*, this Court finds that the Defendant Officer's threat of force (aiming a gun at the side of the Plaintiff's head) was not unconstitutional. Officer Silverman had probable cause to believe that the Plaintiff committed a criminal offense, and when considering the rapidly developing situation, his split second decision to aim a gun at the side of the Plaintiff's head was not unreasonable. In any event, this Court finds that the Plaintiff has failed to show that a reasonable police officer, making this legal stop, would have known that aiming a gun at the Plaintiff's head violated Plaintiff's clearly established rights. *Sauls*, 206 F. 3d 1156 at 1172.

defeat an officer's qualified immunity in an excessive force case." *Nolan*, 207 F. 3d 1253 at 1258 (footnote omitted).[101]

2. THE PLAINTIFF'S SEIZURE

i. The Seizure

The Plaintiff next alleges that Officer McDermott employed excessive force by intentionally colliding with his vehicle.

"The first step in reviewing an excessive force claim [of this nature] is to determine whether . . . there was a 'seizure' within the meaning of the Fourth Amendment." *Vaughan v. Cox*, 343 F. 3d 1323, 1328 (11th Cir. 2003) (internal citations omitted). A seizure occurs "when there is a government termination of freedom of movement *through means intentionally applied*." *Id.* (internal citation omitted) (emphasis in the original).

In *Brower v. County of Inyo*, 489 U.S. 593 (1989), the United States Supreme Court concluded that "it is enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result." *Id.* at 599. Thus, explained the Court, if a police car pulls alongside a fleeing car and sideswipes it, producing a crash, then the termination of the suspect's freedom of movement constitutes a seizure. *See id.* at 597.

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[101]The fact that the *de minimis* force used here may have aggravated injuries Mr. Alderman sustained in the collision with Officer McDermott is immaterial inasmuch as the Plaintiff has produced no evidence indicating that Officer Silverman had knowledge of those injuries prior to his actions. Indeed, the Eleventh Circuit has cautioned that "what would ordinarily be considered reasonable force does not become excessive force when the force aggravates (however severely) a pre-existing condition the extent of which was unknown at the time." *Durruthy*, 351 F. 3d at 1095 n.10. (internal citation omitted).

Following the reasoning in *Brower*, this Court finds that the facts alleged, taken in the light most favorable to the Plaintiff, establish a seizure: a reasonable jury could conclude that Mr. Alderman was meant to be stopped by the physical obstacle of officer McDermott's vehicle -- and that he was so stopped. *See id.* at 599.[102]

ii. Excessive Force

The second step in reviewing an excessive force claim is to analyze the reasonableness of the force applied. This "requires a careful balancing of the nature and quality of the intrusion on the individual's . . . interest against the countervailing governmental interests at stake." *Jackson v. Sauls*, 206 F. 3d 1156, 1169-70 (11th Cir. 2000) (internal citations omitted).

In *Graham v. Connor*, the United States Supreme Court established that "claims that law enforcement officers have used excessive force . . . should be analyzed under the Fourth Amendment." 490 U.S. 386, 395 (1989). In that context, "[w]hether the amount of force used was reasonable is determined objectively 'from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.'" *Priester v. City of Rivera Beach*, 208 F. 3d 919, 924 (11th Cir. 2000) (quoting *Graham*, 490 U.S. 386 at 396). This "requires 'careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety

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[102]If the facts establish that the collision was an accident, then the Fourth Amendment claim fails. *See County of Sacramento v. Lewis*, 523 U.S. 833, 844 (1998) ("[n]o Fourth Amendment seizure would take place where a pursuing police car sought to stop the suspect only by show of authority represented by flashing lights and continuing pursuit, but accidentally stopped the suspect by crashing into him") (internal citation and quotations marks omitted).

of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.'" *Id.* (quoting *Graham*, 490 U.S. 386 at 396).

Importantly, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments - - in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation." *Sauls*, 206 F. 3d 1156 at 1170 (internal citation omitted).

Applying this standard, this Court finds that the facts alleged - viewed in the light most favorable to the Plaintiff - establish that Officer McDermott employed objectively unreasonable force. The severity of the crimes at issue here - loitering, prowling, and lewd and lascivious conduct - was low. Under Florida law, both offenses are misdemeanors. Further, the Plaintiff posed no immediate threat to the safety of the officers or others. He was not armed or dangerous. Nor was he driving unlawfully. Finally, the Plaintiff was not actively resisting arrest or attempting to evade arrest by flight. Since the Defendant Officers were in plain clothing, in unmarked cars, and never identified themselves as law enforcement officials, this was not a police pursuit. To the contrary, this incident involved suspicious vehicles following an unsuspecting citizen home at 2:00 a.m. on a Friday morning.

Officer McDermott nevertheless determined that intentionally ramming Mr. Alderman's vehicle without warning at a high rate of speed was necessary to effect his

seizure. Under that factual scenario, Officer McDermott violated Mr. Alderman's Fourth Amendment rights.[103]

iii. The Doctrine of Qualified Immunity

The doctrine of "[q]ualified immunity provides protection for government officials performing discretionary functions and sued in their individual capacities as long as their conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known." *Stork v. City of Coral Springs*, 354 F. 3d 1307, 1313-14 (11th Cir. 2003) (internal citations omitted). "The purpose of this immunity is to allow government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation . . . protecting . . . 'all but [a] plainly incompetent [official] or one who is knowingly violating the federal law.'" *Lee v. Ferraro*, 284 F. 3d 1188, 1194 (11th Cir. 2002) (internal citation omitted). "If [a] reasonable public official[] could differ on the lawfulness of a defendant's actions, [then] the defendant is entitled to qualified immunity." *Storck*, 354 F. 3d at 1314 (internal citation omitted).

In analyzing the doctrine of qualified immunity, a court must first consider whether the public official "was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred." *Ferraro*, 284 F. 3d 1188 at 1194 (internal citations omitted). If the public official was acting within the scope of his or her discretionary authority, then "the burden shifts to the plaintiff to show that qualified immunity is not

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[103]Again, this Court is required to credit the Plaintiff's version of events at this juncture. Hence, the recitation of the facts in the preceding two paragraphs should not be viewed as established. Plaintiff's account is vigorously disputed by the Defendants.

appropriate." *Id.* (internal citation omitted). To determine if a plaintiff has met this burden, courts apply a two-part test: "(1) 'taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?' and (2) if a constitutional right would have been violated under the plaintiff's version of the facts, the court must then determine 'whether the right was clearly established.'" *Storck*, 354 F. 3d 1307 at 1314 (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

In this instance, the facts and circumstances establish that Officer McDermott was acting within the scope of his discretionary authority when the allegedly wrongful conduct occurred. In addition, the facts alleged (viewed in the light most favorable to the Plaintiff) establish a constitutional violation. *See supra* at 36-38. As a result, this Court must proceed to the question of whether the constitutional right violated was clearly established.

"A party may show that the law was clearly established by (1) pointing to 'a materially similar case [that has] already decided that what the police officer was doing was unlawful,' . . . or (2) demonstrating that 'the words of the pertinent federal statute or federal constitutional provision . . . [are] specific enough to establish clearly the law applicable to particular conduct and circumstances and to overcome qualified immunity, even in the total absence of case law." *Storck*, 354 F. 3d 1307 at 1317 (internal citation omitted). "[I]n the context of excessive force cases, [therefore,] [] an official's conduct could run so afoul of constitutional protections that fair warning was present even when particularized caselaw was absent[.]" *Willingham v. Loughnan*, 321 F. 3d 1299, 1303 (11th Cir. 2003) (collecting cases).

This Court's research reflects no materially similar case finding that an undercover law enforcement officer's intentional ramming of a non-fleeing suspected misdemeanant's vehicle without warning, causing it to crash, constitutes an unreasonable seizure in violation of the Fourth Amendment.[104] Nevertheless, the Court finds that if the facts alleged here are

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[104]In *Adams v. St. Lucie County Sheriff's Dept.*, 998 F. 2d 923 (11th Cir. 1993), the Eleventh Circuit Court of Appeals considered the issue of whether a law enforcement officer's use of a patrol car to terminate a police chase involving a fleeing misdemeanant was clearly established.

There are three reported appellate opinions in *Adams*. In the first *Adams* decision, the issue presented was "whether the district court erred in denying the deputies' motion for summary judgment based on a claim of qualified immunity." *Adams v. St. Lucie County Sheriff's Dept.*, 962 F. 2d 1563, 1565 (11th Cir. 1992). The deputy sheriffs contended "that before the date of the incident in this case, the law was not clearly established that a law enforcement officer's intentional ramming of an automobile during a high-speed chase, causing it to crash, and thereby terminating the freedom of movement of a passenger in the automobile constituted an unreasonable seizure violative of the Fourth Amendment." *Id.* at 1566. The appellate panel held "that before the date of the incident in this case, the law was clearly established that a law enforcement officer's action of intentionally ramming an automobile during a high-speed chase, causing it to crash, and thereby terminating the freedom of movement of a passenger in the car constituted an unreasonable seizure which would have been apparent to a reasonable officer operating under similar circumstances." *Id.* at 1572. Accordingly, the panel upheld the district court's determination that the deputies did not enjoy qualified immunity. *See id.*

Judge Edmondson dissented. He disagreed with the holding that "in May 1985 the law was clearly established to the extent that a reasonable police officer would have known that ramming a fleeing car during a high-speed pursuit constituted a seizure, and more than that, an unreasonable seizure, under the Fourth Amendment." *Id.* at 1574 (footnote omitted). In Judge Edmondson's view, the plaintiff had not met his burden of showing "that in May 1985 it was clearly established that defendants violated the Fourth Amendment." *Id.* In that regard, Judge Edmondson stated: "Because plaintiff has failed to produce clearly established law showing that the police in 1985 would reasonably know they were 'seizing' decedent by ramming the fleeing car, defendants are entitled to summary judgment on qualified immunity grounds." *Id.* at 1575. Further, even assuming "that the law in 1985 clearly established that striking a car constituted a seizure," Judge Edmondson stated that he "would still conclude that defendants were due qualified immunity because plaintiff has produced no case law to support the idea that the method of seizure was unreasonable within the context of the Fourth Amendment and the facts of this case." *Id.* at 1576. In that regard, Judge Edmondson remarked: "I disagree that in 1985 (or now) it was (or is) clearly established that, under the circumstances here, defendants were exerting deadly force or unreasonably seizing the car's passengers." *Id.*

On petition for rehearing and suggesting for rehearing en banc, the Eleventh Circuit vacated the initial *Adams* opinion. 982 F. 2d 472. On rehearing, the appellate court stated, in a per curiam opinion: "For a statement of the facts which we have assumed to be true for our review of the denial of summary judgment,

(continued...)

true, then they present one of those exceptional circumstances where the law enforcement

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[104](...continued)
see 962 F. 2d 1563. On the reasoning set out in the dissenting opinion of Judge Edmondson, 962 F. 2d at 1573-1579, the district court's order denying summary judgment, 759 F. Supp. 795 (S.D. Fla. 1991) is REVERSED." 998 F. 2d 923. Hence, Judge Edmundson's dissent became the opinion of the appellate court.

Judge Hatchett wrote a dissenting opinion; in a footnote, he stated:

> In effect, the majority holds that common sense is insufficient to inform law enforcement officers that they may not use deadly force against a fleeing misdemeanant. Nevertheless, after this opinion, the law is clearly established that law enforcement officers may not use deadly force to apprehend a fleeing misdemeanant.

998 F. 3d at 923.

The basis for Judge Hatchett's statement - that the law was clearly established after the decision on rehearing - is unclear. Judge Edmondson's dissent in the first *Adams* opinion certainly did not clearly establish any such law. To the contrary, Judge Edmondson stated:

> To resolve the question of qualified immunity, we need not decide today whether the Fourth Amendment was violated. But it is doubtful that the alleged level of force in this case was unconstitutionally excessive. A driver -- even a misdemeanant -- eluding arrest in a car driven at high speeds creates a dangerous and potentially deadly force. *See* [*Smith v. Freland*, 954 F. 2d 343 (6th Cir. 1992), cert. denied, 504 U.S. 915, 112 S.Ct. 1954, 118 L.Ed. 2d 557 (1992)]; *cf. Cooper v. State*, 573 So. 2d 74, 76 (Fla. Dist. Ct. App. 1990); *United States v. Garcia*, 868 F. 2d 114, 116 (4th Cir. 1989)[, *cert. denied*, 490 U.S. 1094, 109 S.Ct. 2439, 104 L.Ed. 2d 995 (1989)]. Plaintiffs have brought no case law to our attention, and my research has uncovered no case law, stating or even hinting that ramming a speeding car that presents danger to the public would be an unreasonable seizure under the Fourth Amendment. Even the Court in [*Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L.Ed. 2d 1 (1985)] recognized that, when a fleeing suspect poses a threat of danger to others, a higher degree of force is permissible. 471 U.S. at 11, 105 S. Ct. at 1701. Under the circumstances alleged here, the police very possibly behaved lawfully.

962 F. 3d at 1577-78.

The facts presented here (taken in the light most favorable to the Plaintiff) are distinguishable from *Adams* inasmuch as: (1) Mr. Alderman was not eluding arrest; (2) Mr. Alderman was not driving unlawfully creating a dangerous and potentially deadly force; and (3) Mr. Alderman was not given a warning.

officer's "conduct 'was so far beyond the hazy border between excessive and acceptable force that [the official] had to know he was violating the Constitution even without caselaw on point.'" *Priester v. City of Riviera Beach*, 208 F. 3d 919, 926 (11th Cir. 2000) (internal citation omitted). This Court's decision in *Lewis v. Brick*, 6:99-CIV-128-ORL-22C-Doc. No. 84 (M.D. Fla. Sept. 19, 2000) is instructive on this point.

In *Lewis*, the Plaintiff alleged that a City of Apopka police officer (Officer Brick) intentionally used a patrol car to ram his vehicle, causing Lewis's car to leave the roadway and collide with a utility poll. *See* Doc. No. 84 at 1. Viewed in the light most favorable to the Plaintiff, the facts evinced that: "(1) Officer Brick, who had previously threatened Lewis, intentionally used his patrol car to ram the vehicle Lewis was driving at the time when Lewis was not attempting to flee from him and had broken no traffic laws, except *perhaps* to exceed the speed limit; (2) Brick struck Lewis's vehicle without warning, as Brick did not have his emergency lights or siren activated; and (3) following the incident, Brick switched patrol cars to conceal the fact that the vehicle he was driving had collided with Lewis's." *Id.* at 9 (emphasis in the original). On those facts, this Court concluded that "Brick's behavior was so far beyond the pale of lawful conduct that 'he had to know he was violating the Constitution even without caselaw on point.'" *Id.* (internal citation omitted). Hence, said this Court, "this is one of those exceptional instances in which a governmental actor is not due summary judgment on the basis of qualified immunity." *Id.* at 9-10. The Eleventh Circuit Court of Appeals affirmed that determination on February 14, 2001. *See Lewis v. Brick*, Case No. 00-15012 (11th Cir. Feb. 14, 2001).

As in *Lewis*, the facts and circumstances here (viewed in the light most favorable to the Plaintiff) indicate: (1) that Officer McDermott intentionally used his vehicle to ram the vehicle Mr. Alderman was driving at a time when Mr. Alderman was not attempting to flee from him and at a time when Mr. Alderman was suspected only of committing a minor offense; (2) that Officer McDermott struck Mr. Alderman's vehicle without warning, as he was not driving a patrol car, did not have his emergency lights on, did not have his siren activated, and did not otherwise identify himself as a law enforcement officer; and (3) that following the collision, Officer McDermott attempted to conceal his wrongful conduct by falsely accusing Mr. Alderman of striking his vehicle. If these facts occurred, then Officer McDermott's behavior ran "so afoul of constitutional protections that fair warning was present even when particularized caselaw was absent." *Willingham*, 321 F. 3d at 1303 (explaining the standard for denying qualified immunity in the absence of precedents with similar facts). Accordingly, Officer McDermott's summary judgment motion is due to be denied.

iv. Derivative Liability

Although the undisputed facts indicate that Officers Osborne and Silverman did not ram Mr. Alderman's vehicle, the Plaintiff alleges that they are liable because they failed to prevent the collision. *See* Doc. No. 16, ¶¶ 61 & 69 at pp. 16 & 17-18.

It is well-settled that a police officer may be liable for a fellow police officer's use of unconstitutional force under § 1983. *See Byrd v. Clark*, 783 F. 2d 1002, 1007 (11th Cir. 1986) ("If a police officer, whether supervisory or not, fails or refuses to intervene when a

constitutional violation such as an unprovoked beating takes place in his presence, the officer is directly liable under section 1983") (internal citations omitted).. However, "in order for an officer to be liable . . . the officer must be in a position to intervene." *Sauls*, 206 F. 3d at 1174 (internal citation omitted).

In this instance, there is no evidence that Officers Osborne and Silverman were in a position to intervene. This was a rapidly developing situation, and at all relevant times, each Officer was in his own vehicle. Moreover, Officer McDermott gave no indication that he intended to employ the force allegedly used to stop Mr. Alderman's vehicle. As far as Officers Osborne and Silverman knew, they were simply following a suspected misdemeanant's vehicle until marked police units arrived.

D. MUNICIPAL LIABILITY

The Plaintiff next contends that the Defendant, City of Orlando, is liable under 42 U.S.C. § 1983 for failing to properly and adequately train, supervise, and monitor the Defendant Officers. *See* Doc. No. 16, ¶¶24-41 at 5-11. Allegedly, that deficiency lead the Defendant Officers to incorrectly believe: (1) that they had the authority to use unmarked police vehicles to stalk, frighten, and entrap citizens; (2) that they had the authority to crash an unmarked police vehicle into a non-fleeing misdemeanant suspect's vehicle; (3) that they had the authority to arrest a citizen without probable cause; and (4) that they had the authority to instigate and/or continue a malicious prosecution. *See id.*

"The law is clear that a municipality cannot be held liable for the actions of its

employees under § 1983 based on a theory of respondeat superior." *Griffin v. City of Opa-Locka*, 261 F. 3d 1295, 1307 (11th Cir. 2001) (internal citation omitted), *cert. denied*, 535 U.S. 1033-34 (2002). Instead, "only deprivations undertaken pursuant to governmental 'custom' or 'policy' may lead to the imposition of governmental liability." *Id.* (internal citation omitted).

In the context of allegations of inadequate training and supervision, "a plaintiff may prove a city policy by showing that the municipality's failure to train evidenced a 'deliberate indifference' to the rights of its inhabitants." *Gold v. City of Miami*, 151 F. 3d 1346, 1350 (11th Cir. 1998) (internal citation omitted). Deliberate indifference requires a plaintiff to "present some evidence that the municipality knew of a need to train and/or supervise in a particular area and the municipality made a deliberate choice not to take any action." *Id.* at 1350-51 (internal citations omitted). "[W]ithout notice of a need to train or supervise in a particular area, a municipality is not liable as a matter of law for any failure to train or supervise." *Id.* at 1351.

In this instance, the Plaintiff has not offered any evidence of a written or oral policy of inadequate training or supervision on the part of the City of Orlando. Nor has the Plaintiff established notice of the need to train or supervise. Indeed, the record is bereft of evidence of abuses similar to those alleged in the Amended Complaint sufficient to put the City of Orlando on notice. Instead, it is apparent that the claim of government liability is predicated on unsupported and speculative allegations of custom and policy. That type of evidence is insufficient to establish municipal liability under § 1983.

E. SPECIAL INTERROGATORIES FOR THE JURY

In concluding that Officer McDermott is not entitled to summary judgment on the basis of qualified immunity, this Court notes that he is not foreclosed from raising the defense at trial. *See Vaughan v. Cox*, 343 F. 3d 1323, 1333 (11th Cir. 2003). If the jury accepts his version of the facts - that the collision was the result of negligence or intentional conduct on the part of Mr. Alderman - then qualified immunity would bar Mr. Alderman's claim under § 1983. At trial, Officer McDermott "may seek special interrogatories to the jury to resolve factual disputes going to [his] qualified immunity defense." *Id.* (internal citations omitted).

F. STATE LAW CLAIMS

Title 28, United States Code, Section 1367 codifies the doctrines formerly known as pendent and ancillary jurisdiction. *Palmer v. Hosp. Auth. of Randolph County*, 22 F. 3d 1559, 1562 n.3 (11th Cir. 1994); *James v. Sun Glass Hut of California, Inc.*, 799 F. Supp. 1083, 1084 (D. Colo. 1992). Section 1367 (c) lists specific circumstances in which a district court may decline to exercise supplemental jurisdiction over a state law claim joined with a claim over which the court has original jurisdiction. The district court may refuse to exercise supplemental jurisdiction if, *inter alia*, the state claim raises a "novel or complex issue of State law" or "substantially predominates over" the claim over which the court has original jurisdiction. 28 U.S.C. § 1367(c)(1) & (2). Additionally, a district court may decline to exercise jurisdiction over a state law claim if "in exceptional circumstances, there are other compelling reasons for declining jurisdiction." § 1367(c)(4). If, after examining the factors

listed in § 1367(c), the district court "decides that it has the discretion . . . to decline jurisdiction . . ., it should consider the traditional rationales for pendent jurisdiction, including judicial economy and convenience, in deciding whether or not to exercise that jurisdiction." *Palmer*, 22 F. 3d at 1569.

Courts considering supplemental jurisdiction have declined to exercise jurisdiction in cases in which the state claims require different or foreign elements of proof. *See James*, 799 F. Supp. at 1085 (declining to exercise supplemental jurisdiction over employee's state law claims where they substantially predominated over ADEA claim); *Gregory v. Southern New England Telephone Co.*, 896 F. Supp. 78, 84 (D. Conn. 1994) (declining to exercise supplemental (pendent party) jurisdiction over employee's state law claim against manager, where Title VII claim against manager had been dismissed and allegations against manager were wholly distinct from those against remaining defendant). Additionally, courts in this circuit have hesitated to exercise pendent jurisdiction over state claims which would only serve to introduce jury confusion and delay. *See Bennett v. Southern Marine Mgmt. Co.*, 531 F. Supp. 115, 117-118 (M.D. Fla. 1982) (holding that combining Title VII and state tort and contract claims would cause confusion and delay, which is at odds with important federal policies underlying Title VII); *Williams v. Bennett*, 689 F. 2d 1370, 1380 (11th Cir. 1982) (affirming trial judge's exercise of discretion not to assert pendent party jurisdiction and deference to state court's resolution of the state law claim of assault and battery), *cert. denied*, 464 U.S. 932 (1983). Finally, courts have pointed to differences in recoverable damages as a basis for refusing to exercise supplemental or pendent jurisdiction. *See James*,

799 F. Supp. At 1085 ("all the state law claims involve damages not available under ADEA"); *Bennett v. Southern Marine Mgmt. Co.*, 531 F. Supp. At 117 ("[T]hese state claims also support theories of recovery unavailable under Title VII; presentation of additional elements of damages necessarily involves additional discovery and trial time").

Having reviewed the allegations contained in the Amended Complaint (Doc. No. 16), this Court finds that the Plaintiff's state law claims substantially predominate over his remaining federal law claim. Moreover, the Court finds that combining the Plaintiff's 42 U.S.C. § 1983 claim with his state law claims would only serve to create jury confusion and delay. Finally, the Court notes that the there are a multitude of procedural and substantive differences between the Plaintiff's federal and state law claims. Specifically, the § 1983 claim requires a more complex set of legal and factual determinations.

In accordance with 28 U.S.C. § 1367(c), therefore, this Court declines to exercise supplemental jurisdiction over the Plaintiff's state law claims: Count II (alleging negligence against Defendant City of Orlando for the negligence of its police officers); Count IV (alleging assault and battery against Defendant Officer McDermott for intentionally and recklessly driving a motor vehicle into the Plaintiff's vehicle causing personal injuries); Count V (alleging false arrest and malicious prosecution against Defendant Officer McDermott); Count VI (alleging false arrest and malicious prosecution against Defendant Officer Osborne); and Count VII (alleging false arrest and malicious prosecution against Defendant Officer Silverman). Those claims shall be remanded to the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida.

V. CONCLUSION

Based on the foregoing, it is **ORDERED** that:

1. The Defendants', Juan McDermott, Douglas A. Osborne, John J. Silverman, and the City of Orlando, Florida, February 17, 2004 Motion for Summary Judgment (Doc. No. 33) is **GRANTED IN PART** and **DENIED IN PART**.

(a) As to the claim of false arrest in violation 42 U.S.C. § 1983, the Motion for Summary Judgment is **GRANTED**. The Defendants, Officer McDermott, Officer Osborne, and Officer Silverman, had probable cause or, alternatively, at least arguable probable cause, to arrest the Plaintiff, Michael W. Alderman, for loitering, prowling, and/or lewd and lascivious conduct in the early morning hours of June 30, 2000.

(b) As to the claim of malicious prosecution in violation of 42 U.S.C. § 1983, the Motion for Summary Judgment is **GRANTED**. The Defendants, Officer McDermott, Officer Osborne, and Officer Silverman, have absolute immunity from liability on that claim.

(c) As to the claim of excessive force in connection with effecting the Plaintiff's, Michael W. Alderman, arrest following the collision in violation of 42 U.S.C. § 1983, the Motion for Summary Judgment is **GRANTED**. The force applied and the injury sustained in that sequence of events were no more than *de minimis*.

(d) As to the claim of excessive force in connection with the Plaintiff's, Michael W. Alderman, seizure in violation of 42 U.S.C. § 1983, the Motion for Summary Judgment is **GRANTED IN PART** and **DENIED IN PART**. The motion is **GRANTED** insofar as it concerns the Plaintiff's claim of derivative liability against Officers Douglas A. Osborne and John J. Silverman for the collision. The motion is **DENIED** insofar as it concerns the Plaintiff's claim of direct liability against Officer Juan McDermott for the collision. A jury issue exists concerning whether the Defendant, Officer Juan McDermott, violated the Plaintiff's Fourth Amendment right to be free from the use of unreasonable and excessive force when the collision occurred.

(e) As to the claim of municipal liability under 42 U.S.C. § 1983, the Motion for Summary Judgment is **GRANTED**. The Plaintiff has not offered any evidence of a written or oral policy of inadequate training or supervision on the part of the City of Orlando. Nor has the Plaintiff established notice of the need to train or supervise. The record is bereft of evidence of abuses similar those alleged in the Amended Complaint.

2. In accordance with 28 U.S.C. § 1367(c), this Court declines to exercise supplemental jurisdiction over the Plaintiff's, Michael W. Alderman's, state law claims. Accordingly, the Plaintiff's state law claims are hereby **REMANDED** to the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida. The clerk shall take all necessary steps to effectuate this remand including forwarding a certified copy of this Order to that court.

3. The Clerk shall terminate Defendants, Officer Douglas A. Osborne, Officer John J. Silverman, and the City of Orlando, Florida, a municipal corporation, as parties in this matter.

4. Only the claim for excessive force asserted against Defendant, Officer Juan McDermott, in connection with the Plaintiff's, Michael W. Alderman, seizure remains in this case.

5. A final judgment will be entered on the claims disposed of in this Order at the conclusion of this case.

6. All other pending motions are **DENIED WITHOUT PREJUDICE**. On or before Friday, May 7, 2004, the parties may refile such motions, if necessary, taking into account the changes this Order effects.

7. All requested verdict forms (Doc. No. 76), proposed jury instructions (Doc. No. 75), proposed voir dire questions (Doc. No. 74), and the joint pretrial statement (Doc. No. 79) shall be **STRICKEN** from the record and promptly returned to the respective parties. On or before Friday, May 7, 2004, the parties shall refile requested verdict forms, proposed jury instructions, proposed voir dire questions, and a joint pretrial statement taking into account the changes this Order effects.

8. Within ten days from the date of this Order, the Defendant, Officer Juan McDermott, shall advise this Court of whether he intends to appeal the denial of qualified immunity on summary judgment.

9. Absent an appeal of the denial of qualified immunity on summary judgment, trial shall commence at 9:00 a.m. on Tuesday, May 25, 2004 in Courtroom 2, Sixth Floor, George C. Young U.S. Courthouse & Federal Building, 80 North Hughey Avenue, Orlando, Florida.

DONE and **ORDERED** in Chambers, in Orlando, Florida this 27th day of April, 2004.

ANNE C. CONWAY
United States District Judge

Copies furnished to:

Counsel of Record
Unrepresented Parties
Administrative Law Clerk
Clerk of Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida
Case No. 02-CA-11832-40

F I L E C O P Y

Date Printed: 04/27/2004

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